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No. 06-844

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In The
Supreme Court of the United States

COL. JEFFREY B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, PENNSYLVANIA STATE POLICE,

Petitioner,

v.

CONCHATTA, INC., T/D/B/A CLUB RISQUE ON THE DELAWARE; GAIL BAKER; and SABRINA BARRAR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Are a state statute and regulation which prohibit the presentation of "lewd" entertainment in the more than 15,000 establishments in the Commonwealth of Pennsylvania where alcoholic beverages may be served – including not only taverns, but dinner theaters, traditional theaters, concert halls, and auditoriums – facially overbroad, in violation of the First and Fourteenth Amendments, when neither the courts nor the agencies of that Commonwealth have ever provided an authoritative narrowing construction of that term, and have in fact held that the restrictions in question are to be liberally construed and broadly applied?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Conchatta, Inc., t/d/b/a Club Risque on the Delaware hereby advises the Court that:

(1) It has no parent corporation, and;

(2) No publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

This case involves a straightforward overbreadth challenge to a Pennsylvania statute and regulation which restrict the content of entertainment presented in the more than 15,000 establishments licensed to serve alcohol in that Commonwealth.

Respondents filed suit in the United States District Court for the Eastern District of Pennsylvania in March 2001, seeking declaratory and injunctive relief against the contested provisions, arguing that they were overbroad both on their face and as applied to them, as well as unconstitutionally vague. Pet. App. at 3a-4a.

The restrictions at issue, on their face and in plain terms, restrict expression in every establishment in Pennsylvania where alcohol may lawfully be served, as well as in any facility which is connected to such an establishment. Before being invalidated, in part, by the district court, the contested statute made it unlawful:

> for any licensee, under any circumstances, to permit in any licensed premises or in any place operated in connection therewith any lewd, improper or immoral entertainment, regardless of whether a permit to provide entertainment has been obtained or not.

47 PA. CONS. STAT. ANN. § 4-493(10) (WEST 2004).

The regulation likewise provided, in terms no-less sweeping than the statute:

> A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or

> place connected therewith, to be in contact or associate with the patrons in the establishment for a lewd, immoral, improper, or unlawful purpose.

40 PA. CODE § 5.32(C) (1996).

In April 2001, the district court refused to preliminarily enjoin the enforcement of the contested provisions, finding the Respondents unlikely to succeed on the First Amendment merits of their claims. Pet. App. at 64a.

The district court did so despite having heard extensive expert testimony on erotic dance from a cultural anthropologist, Dr. Judith Hanna. Her uncontested opinion was that nudity plays not only a significant role in the expressive aspect of striptease dance – but that nudity, partial nudity, gyrations and erotic touch of exactly the sort proscribed by the contested provisions – occurs in a wide variety of traditional artistic performances as well. *See* Third Cir. Appx. at 219-62, 306-35.

The district court deferred further adjudication, and administratively closed the case, pending the resolution, by the Pennsylvania Supreme Court, of two cases then pending before that tribunal, one of which involved the contested provisions themselves. Pet. App. at 65a.[1]

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[1] In *Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801, 804-05 (Pa. 2002), the Pennsylvania Supreme Court limited its review to the question of whether the statute at issue here violated the First Amendment rights of the plaintiff in that case as-applied to the entertainment presented in its establishment. The district court also noted the pendency, on appeal after remand, of *City of Erie v. Pap's A.M.*, 812 A.2d 591 (Pa. 2002), in which the Pennsylvania Supreme Court considered the validity, under its state constitution, of the provisions sustained by this Court two years earlier. Pet. App. at 65a.

On appeal, a divided panel of the Third Circuit affirmed the district court decision on other grounds. Pet. App. at 44a.

Significantly, however, both the panel majority – including then Judge Alito – and Judge Roth in dissent, found that the Respondents were likely to succeed on the merits of their facial overbreadth claim. Pet. App. 41a (majority), 46a-49a (dissent).

The case returned to district court, and the parties filed cross motions for summary judgment in April 2004. Pet. App. at 6a.

In February 2005, the district court denied summary judgment to the Petitioner, and granted partial summary judgment in favor of the Respondents, holding that two of the three operative terms in the contested statute and regulation – "improper" and "immoral" – were unconstitutionally vague. The court struck those terms from the contested provisions, but left intact their respective prohibitions against "lewd" entertainment, reasoning that that term had acquired a well-understood meaning at common law, and was accordingly not vague. Pet. App. at 27a-28a.

Despite their having been fully briefed, the district court addressed neither the facial nor the as-applied overbreadth claims raised by the Respondents on summary judgment. Pet. App. at 7a.

Respondents asserted both their vagueness and overbreadth challenges on appeal. The Third Circuit found the contested regulations to be overbroad on their face, finding it unnecessary to reach the question of vagueness. Pet. App. at 22a.

The manner in which the Court of Appeals reached its decision was altogether unremarkable, firmly grounded on settled precedent, and amply supported by the record.

As demonstrated below, the Court of Appeals – faced with sweeping restrictions on expression which governed establishments and performances without even an alleged connection to the adverse secondary effects attributed to adult entertainment – had neither the need, nor the occasion, to do anything novel in finding those restrictions to be overbroad on their face.

Nor, as we shall see, did the Court of Appeals resolve this matter in a fashion that was different from that employed by its sister circuits in similar cases. In each case cited by the Petitioner, the circuit in question measured the scope of the contested provision in light of its language, the mandates of state law, and the peculiar enforcement history with which it came to bar. And in each case in which a narrowing construction could not be found, the Court of Appeals proceeded to assess the actual reach of the contested law against the ostensible purpose for which it was enacted.

The means-ends comparison which is a staple of overbreadth analysis is neither complex nor controversial. That it may be found both in cases involving restrictions on pure speech and in cases involving limits on expressive conduct is likewise unremarkable. The fact that circuit courts have turned for guidance, in cases such as this, to both the speech and expressive-conduct precedents of this Court fails to demonstrate any conflict between the circuits, much less one that would merit review by this Court.

REASONS FOR DENYING THE WRIT

This is not a case that merits the attention of the Court. It involves neither a novel nor a disputed question of law, nor an important but unsettled federal question.

Despite the best efforts of the Petitioner to clothe it in more seductive garb, this is nothing but a prosaic First Amendment overbreadth case, that was correctly, and routinely resolved by the Court of Appeals through the application of legal principles which have been settled for more than a generation.

I. The Third Circuit Correctly Found the Contested Provisions to be Overbroad on Their Face.

In the face of allegations that the statute and regulation were facially overbroad, the Third Circuit assessed whether those provisions could be narrowly construed so as to avoid a question of constitutional dimension. Pet. App. at 8a-9a. That such a construction was impossible is abundantly evident from the record.

A. The Contested Provisions Cannot be Narrowly Construed to Avoid Constitutional Defects in a Fashion Consistent with Pennsylvania Law.

In its effort to divine a narrowing construction of the contested provisions, the Court of Appeals looked both to the decisions of the Pennsylvania courts, and to the manner in which the Petitioner and his predecessors had enforced those provisions in the half-century since the statute was first adopted. Pet. App. 9a-13a. In undertaking that analysis, the

appellate court duly balanced its duty to find a narrowing construction, under *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) with the limitations imposed upon that effort by *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988), canvassing state law for any limiting construction to which the contested provisions might be "readily susceptible" but refusing to redraft them to avoid their invalidation. Pet. App. at 9a.

But the courts of Pennsylvania have never construed, much less narrowed, the operative term at issue.

While a number of decisions have upheld the application of the contested provisions to erotic dance performances in adult cabarets, no decision has ever defined what is meant by "lewd," and no case has ever narrowly construed the contested provisions to apply **only** to adult entertainment such as striptease acts, or to only certain specific aspects of such performances. Pet. App. at 9a.

The Third Circuit contrasted this silence with the manner in which a New Jersey regulation containing some of the same terms could be narrowed under the case law of that state.[2]

Only five weeks prior to deciding the case now at bar, the Third Circuit sustained that regulation against an overbreadth challenge, holding that New Jersey law provided a clear and limiting definition of its operative terms – "lewd" and "immoral" – which cabined the manner

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[2] In *181 South, Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006), sustained N.J. ADMIN. CODE § 13:2-23.6(A)(1) (2005), which prohibits "lewd" and "immoral" activity on premises where liquor may be sold. *Id.*, at 230.

in which officials could enforce the law against entertainers. *See 181 South, Inc.*, 454 F.3d at 234-35.

Notably, the decision sustaining that regulation was written by Circuit Judge Fuentes – who authored the opinion at issue here – and was joined by Circuit Judge Roth, who in the first appeal in this case opined in dissent that the provisions now at bar were fatally overbroad.[3]

To say that Pennsylvania has never narrowed the contested provisions is, in many ways, an understatement.

Since first considering the scope of the contested provisions nearly fifty years ago, the appellate courts of Pennsylvania have repeatedly stressed that the language of those provisions is to be liberally construed.

The first case to address the statute, *Tahiti Bar, Inc. Liquor License Case,* 150 A.2d 112 (1959), held that a striptease performance involving "bumps and grinds" in which performers removed "substantially all of their clothing" while "moving the lower part of the body backward and forward," *id.* at 115, "'was lewd or obscene as well as immoral under any definition of those terms.'" *Id.* at 119 (internal citations omitted).

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[3] The suggestion, by the Petitioner, that the dissimilar outcomes in these cases underscores the confusion with which the circuits confront restrictions on erotic expression, Pet. at 14, is unavailing. The different outcomes are easily explained by the fact that New Jersey courts have defined lewdness with a specificity that the Pennsylvania courts have not. If anything, the difference highlights the fact that the Third Circuit, and Judges Fuentes and Roth, will not hesitate to sustain a law limiting entertainment in liquor premises when a narrowing construction is available.

Notwithstanding the fact that its First Amendment reasoning is profoundly antiquated, the courts of Pennsylvania have steadfastly cited *Tahiti Bar* for the proposition that the statute at issue here should be broadly construed by state liquor enforcement agents.

> Again, we repeat that while partially nude dancing may be accepted "in this day and age" in other forms of entertainment not subject to control by the Board, that fact cannot dictate the result here. The Board is an enforcement agency charged with policing the activities of licensees. Its enforcement agents necessarily must make judgment calls as to what is and what is not a violation of the entertainment restrictions set forth in the Code. These enforcement decisions involve additional considerations not applicable to other areas of the law because of the Board's broad enforcement powers and the licensee's limited privileges under the Code.

Pennsylvania Liquor Control Bd. v. J.P.W.G., Inc., 489 A.2d 992, 995 (Pa. Commw. 1985) (citing *Tahiti Bar* without pinpoint citation). On the strength of this reasoning, the Commonwealth Court found that "badinage" between a bare-breasted dancer and patrons violated the prohibition on lewd, improper and immoral entertainment. *Id.* at 994.

This expansive view of the contested provisions was endorsed by the Pennsylvania Supreme Court as recently as 2002. In *Purple Orchid*, 813 A.2d at 810, that court repeated that the statute should be broadly construed to promote public welfare and morals, and held that it provides state liquor agents with the authority to do whatever is "deemed necessary or advisable" toward that end.

In sum, the courts of Pennsylvania have not only declined to narrow the language at issue over the years, they have repeatedly encouraged officials to construe that language broadly.

And those officials have heeded their invitation. The Petitioner now contends that he has strictly limited enforcement of the contested provisions, in practice, to cases involving bare-breasted dancers, nudity and contact between dancers and patrons, and claims the Third Circuit erred in not adopting his statement of practice as an authoritative and limiting construction. Pet. at 9-10, 23.

The Court of Appeals rightly rejected this contention, joining the Sixth and Eighth Circuits in noting that the constitutional mischief worked by an overbroad statute – the chilling of future First Amendment freedoms – is not ameliorated simply because the state claims that it has no present interest in enforcing a provision to the fullest extent consistent with its text. Pet. App. at 13a.[4]

But the Petitioner cannot credibly make even **that** claim on the record in this case. The suggestion that officials have enforced, and will enforce, the statute and regulation only against "nude dancing, genital exposure, and/or patron/entertainer contact in adult establishment settings," Pet. at 23, is simply belied by the record.

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[4] The court pointed to both *Odle v. Decatur County, Tennessee*, 421 F.3d 386, 397 (6th Cir. 2005) and *Ways v. City of Lincoln, Nebraska*, 274 F.3d 514, 519-20 (8th Cir. 2001) in support of its position, while noting that the Eighth Circuit in *S.O.B., Inc. v. County of Benton*, 317 F.3d 856, 865 (8th Cir. 2003) had accepted official promises of restrained enforcement as authoritatively narrowing, but only where the law at issue contained an express exemption for traditional arts venues.

In an advisory opinion issued in April 2001, the Liquor Control Commission warned one tavern owner that the display of bare-breasted women on video terminals would violate the statute.[5] That warning explicitly contradicts the Petitioner's claim that he will enforce the contested provisions to only live performances in adult establishments, and renders hollow the claim that the provisions at issue can be narrowly construed based upon past practice.

So too does the legislative history of the statute. In 2001, the Pennsylvania General Assembly modified portions of the liquor code, including definitional sections relating to the sorts of establishments subject to the statute. The legislature created a class of establishments known as "public venues," which includes art museums, stadia, arenas and convention centers. 47 PA. CONS. STAT. ANN. § 4-412(F)(1) (WEST 2007).

But while § 4-412 exempts such establishments from most of the requirements of § 4-493, it expressly does not exempt them from the broad proscriptions on "lewd, immoral and improper" entertainment set forth in the statute, § 4-493(10).[6]

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[5] The advisory opinion of the Pennsylvania Liquor Control Board, dated April 5, 2001, was attached to initial brief filed by the Respondents in the Third Circuit. Pet. App. at 16a, n.5.

[6] The statute contains thirty-two subparts, which govern a wide range of conduct relating to the distribution and sale of alcoholic beverages, and including such matters as: the sale of such beverage on credit (§ 4-493(2)); the display of brand names on taps and spigots (§ 4-493(6)); advertisements containing words alluding to the strength of an alcoholic beverage (§ 4-493(9)); record keeping (§ 4-493(12)); check cashing for customers (§ 4-493(15)), and; the consumption of alcohol by bartenders on duty (§ 4-493(28)).

In this light, the Court of Appeals was unquestionably correct in reading the statute – undiluted by a narrowing construction – to apply to a broad range of performance venues, and in reading both the statute and the regulation to apply to nudity and other sorts of erotic expression (of which more shortly) in taverns, dinner theaters and a host of smaller venues throughout the Commonwealth.

That court was likewise correct in concluding that the contested provisions, read at face value, were patently overbroad.

B. The Contested Provisions Restrict Artistic Expression in Thousands of Establishments With No Connection to the Adverse Secondary Effects Attributed to Adult Entertainment, and Are Thus Substantially Overbroad by Any Measure.

Read without the undeserved benefit of a narrowing construction, the contested provisions sweep in a vast quantity of protected expression, presented in a wide range of artistic venues, something duly noted by the Third Circuit below. Pet. App. at 14a-15a.

The protestations of the Petitioner notwithstanding, Pet. at 23, Pennsylvania courts have equated lewdness with simple nudity, in the course of interpreting the statute.[7]

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[7] The Commonwealth Court in *J.P.W.G.*, 489 A.2d at 995 wrote that "we are convinced that the partial nudity of a female dancer in a public bar is at the very least improper, and in our opinion also falls within the board dictionary definition of immoral and lewd."

The parties did not dispute that the statute applies to every one of the more than 15,000 establishments in the Commonwealth where alcohol may lawfully be served, nor that among these are theaters, comedy clubs, ordinary restaurants, dinner theatres and "other venues that present some form of entertainment and serve alcohol." Pet. App. at 15a.

And the express language of the statute easily supports the conclusion of the Court of Appeals that it governs places "operated in connection with" licensed premises, such as the lobbies and other places connected to traditional performing arts venues where alcohol may be served during intermission or otherwise. Pet. App. at 15a.

As previously noted, the Petitioner (through his predecessor) has formally opined that the contested provisions reach even video images of nudity, extending their reach to every image on every television screen in every tavern in Pennsylvania, and exposing to sanctions bar keepers who show programs on HBO or Cinemax to their patrons.

Pennsylvania has reserved to its enforcement officials the power to "make judgment calls as to what is and what is not a violation of the entertainment restrictions set forth in the Code." *J.P.W.G.*, 489 A.2d 992, and has legislatively extended the reach of that Code to more than 15,000 venues in which, collectively, every conceivable sort of entertainment is presented.

As eloquently summarized by Judge Roth in her dissent from the first appeal in this case:

> the Liquor Code establishes a standard of propriety governing a number of plays, musicals, concerts, political satires, comedies, ballets, dramas, singing performances, dancing performances, poetry readings, and art shows throughout Pennsylvania. It gives Pennsylvania police officers wide latitude to choose which one of these performances to penalize on the ground that they are lacking in propriety. Indeed, the Commonwealth admitted as much at oral argument, when it stated that, in theory, officers could cite a performance of the musical "Hair" under § 4-493(10).

Pet. App. at 47a.

Significantly, for purposes of overbreadth analysis, this leaves potential performers and promoters without any indication as to whether their own speech might run afoul of the law. They would be compelled to ask, as did Judge Roth:

> Would it be immoral or improper to celebrate Bloomsday by reading aloud from James Joyce's Ulysses in an Irish pub? And how would the Liquor Commission view "brew and view" theaters showing films such as Trainspotting, American Pie, or Lolita? These questions become increasingly troublesome in light of the sheer amount of entertainment at performing arts facilities that is now subject to this vague standard of propriety.

Pet. App. at 48a-49a.

The Court of Appeals incorporated this reasoning by reference into the decision now at issue, Pet. App. at 16a, and was on solid ground in doing so.

II. The Third Circuit Decided This Case Through the Straightforward Application of Well-Established Overbreadth Principles, in a Manner That Conflicts with Neither its Sister Circuits nor the Supreme Court of Pennsylvania.

Petitioner asserts that the circuit courts to have considered restrictions on adult entertainment in liquor establishments have approached the issue in so disparate a fashion as to evidence the need for doctrinal guidance from this Court. Pet. at 12-14.

In support of this contention, the Petitioner cites a number of recent decisions which, he claims, reflect the disparate approaches taken by the courts of appeals. Pet. at 19-22.

Some decisions, he notes, have assessed overbreadth claims such as ours in light of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and its progeny.[8]

Other cases, the Petitioner observes, have assessed contested restrictions both in light of *Broadrick*, and under the intermediate scrutiny standard applied to expressive conduct by *United States v. O'Brien*, 391 U.S. 397 (1968).[9]

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[8] Pet. at 19. The Petition has grouped the cases he cites by circuit, which creates the impression of a wider range of analytical approaches than is possible when only two (supposedly competing) lines of authority are available. We have sorted his list for clarity. In the "*Broadrick* only" camp, he counts the following cases: *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Ways v. City of Lincoln, Nebraska*, 274 F.3d 514 (8th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *Gammoh v. City of LaHabra*, 395 F.3d 1114 (9th Cir. 2005).

[9] Pet. at 19-21. In this camp, the Petitioner counts: *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir.

(Continued on following page)

Some cases the Petitioner characterizes as employing intermediate scrutiny, but without reference to *O'Brien*.[10]

The Third and Fourth Circuits, he says, have applied the fourth prong of *O'Brien* directly to the question of overbreadth, without any other analysis, a "confusing and illogical" approach unlike those described above.[11]

All this, the petitioner contends, demonstrates doctrinal confusion at the circuit level. The law is in disarray, the Petitioner says, and the Court has, in this case, the opportunity to clarify its prior holdings. Pet. at 16-17.

But this is not the case.

The Petitioner would conjure the specter of judicial disarray from parenthetical summaries of a dozen cases, each unique on its facts, and each involving the application of overbreadth doctrine in different circumstances.

In reality, the cases reflect no such disarray. The cases cited by the Petitioner have applied the same analytical principles to measure the reach of a particular regulation against the need it was ostensibly adopted to address.

1998); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); and *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001) (which, Petitioner notes, applied *O'Brien* to a different set of claims than those to which it applied what he characterizes as "overbreadth . . . without reference to scrutiny").

[10] Pet. at 20. These include *Gammoh*, 395 F.3d at 1121-22 and *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

[11] Pet. at 20-21, citing the Third Circuit decision now at bar and *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002).

That some of those cases have taken guidance from the *Broadrick* line of cases, while others have turned to *O'Brien,* alone or in combination with *Broadrick* and its progeny, is of no moment.

The analyses set forth in those cases reflects the same balancing of means and ends familiar in a host of constitutional contexts, and to the extent the Petitioner claims otherwise, he champions a distinction without a difference.

The Petitioner has failed to identify a single case in which the parallel application of a *Broadrick* and an *O'Brien* analysis has lead to conflicting results.[12]

He has identified no case in which a circuit, torn over the question of which doctrine to apply, preferred *Broadrick* to *O'Brien*, or visa-versa. Nor has he identified a case in which a court was asked by the parties before it to choose between the two cases as alternative avenues of analysis.

He has identified no situation in which the outcome of a case hinged upon the application of one case or the other.

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[12] For instance, the Fifth Circuit in *J&B Entertainment*, 152 F.3d at 368, found an anti-nudity statute was not overbroad on its face, but remanded the case to the district court for further inquiry regarding whether the ordinance was in fact adopted to address the secondary effects of adult speech. In *S.O.B., Inc.*, 317 F.3d at 862, 865, the Eighth Circuit found, on an uncontested record, that a ban on public nudity did not violate the means-ends test of *O'Brien's* fourth prong, and went on to hold that the law was not overbroad under *Broadrick*. And in *Deja Vu*, 274 F.3d at 389, the Sixth Circuit invalidated, under general overbreadth principles, the definitional sweep of an adult-use ordinance, but sustained the mechanics of its licensing scheme under *O'Brien*, treating those as distinct claims, which were raised by separate parties.

He has identified no conflict among the circuits as to which line of cases should apply. And he has failed to explain how the inquiries presented by those cases are in any way at odds, or so dissimilar as to require the intervention of this Court.

The pervasive confusion the Petition attributes to the circuits is simply illusory. That the circuits, presented with questions relating to the regulation of adult speech, should take guidance from all the relevant decisions of this Court is not a situation that requires a judicial remedy.

Nor has the Petitioner identified any conflict between the Third Circuit and the Pennsylvania Supreme Court. Pet. at 22.

The latter tribunal never reached the question of whether the statute at issue is facially overbroad, *Purple Orchid*, 813 A.2d at 804. As such, it did not assess its reach as it might apply to establishments unlike the litigants in that case, and never squarely addressed the question of overbreadth to which the Third Circuit turned to *O'Brien* for guidance.

There is no squarely presented conflict between the two, and any distinction between the two cases is hopelessly convoluted by the distinct postures in which they arose.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: January 17, 2007